

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

AL SCHWEIZER and SAL SEDITA	:	
	:	
Petitioners,	:	
	:	
v.	:	Consol. C.A. No. 06A-08-007 JAP
	:	
BOARD OF ADJUSTMENT OF	:	
THE CITY OF NEWARK,	:	
DELAWARE	:	
Respondent.	:	

Submitted: January 26, 2009  
Decided: March 4, 2009

Upon Petition for Writ of Certiorari.  
**DENIED.**

**MEMORANDUM OPINION**

Mark D. Sisk, Esquire, Conaty, Curran & Sisk Law Offices, Newark,  
Delaware, Attorney for Petitioners.

Roger A. Akin, Esquire, City Solicitor, Newark, Delaware, Attorney for  
Respondent.

PARKINS, J.

## I. INTRODUCTION

Before the Court are Mr. Schweizer and Mr. Sedita's two petitions for writ of certiorari to review decisions of the Board of Adjustment of the City of Newark, Delaware (the "Board"). The primary issue presented in one petition is whether the Board committed legal error when it upheld the City's Building Department's eviction of Pi Kappa Alpha ("PiKA") fraternity members from an off-campus fraternity house after the University of Delaware suspended the fraternity. The principal issue in the other petition is whether the alleged subsequent occupancy of the premises by another fraternity preserved the property's status as a non-conforming use. Because the Board did not commit any legal error in either matter the petitions for writ of certiorari are both **DENIED**.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Schweizer and Mr. Sedita ("Petitioners") own real property in the City of Newark located at 155 South Chapel Street. Prior to 2005, the property was leased to Delta Eta Corporation,<sup>1</sup> which in turn allowed the local chapter PiKA at the University of Delaware to use the premises as a

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<sup>1</sup> Petitioner Schweizer was (and perhaps still is) president of Delta Eta Corporation. *Delta Eta Corp. v. City Council of Newark*, 2003 WL 1342476 (Del. Super. March 19, 2003).

fraternity house and leased rooms to student members of PiKA. Many, if not all, fraternities at the University possess charters from national fraternities, and PiKA is no exception. However, the possession of a charter from a national organization does not, by itself, allow a group of students to conduct itself as a fraternity. Rather the University has reserved for itself the final say as to which groups can do so.

In July 2005, the University of Delaware suspended PiKA for a period of four years for violating University rules of conduct. The University conducted a hearing before suspending PiKA at which time its members were permitted to appear before the University's tribunal. It is undisputed that the instant Petitioners, who are the owners of the property occupied by PiKA, did not participate in the hearing.

The University's suspension of PiKA's privilege to operate as a fraternity has significant repercussions to the zoning of Petitioners' property. Several years ago the City of Newark revised its zoning code to prohibit fraternities and sororities in residential areas within the city limits. Existing fraternity and sorority houses, including PiKA, became non-conforming uses which were allowed under the code to continue so long as the fraternity's or sorority's privileges were not revoked by the University for more than a year. Section 32-51(b) of the Newark Zoning Code provides that a fraternity

that is suspended by the University of Delaware for a period of more than one year “shall vacate the building” and that building’s use as a fraternity “shall be terminated immediately upon such University suspension.”

Upon receiving notice of the suspension of PiKA’s privileges, the Building Department of the City of Newark directed PiKA to vacate the premises and advised Petitioners that the use of the property as a fraternity or sorority house was now banned by the Newark Zoning Code. Petitioners appealed to the Respondent Board, which, after a lengthy hearing taking place on four different dates, upheld that decision. Petitioners seek a writ of certiorari from this Court. A judge previously assigned to this matter dismissed this petition for perceived procedural flaws, but the Supreme Court reversed and remanded for consideration of the merits. This is the Court’s resolutions of the merits of that petition.

After the University suspended PiKA, Petitioners entered into a lease with Alpha Beta Alumni Corp. which in turn allowed members of Kappa Delta Rho fraternity to occupy the premises. In a separate hearing Petitioners contended before the Board that the occupancy of their property by Kappa Delta Rho preserves the non-conforming use status of that premises. The Board rejected that contention, and Petitioners filed a second

petition for a writ of certiorari. Because both petitions involve common issues of law, this Court consolidated them.

Petitioners make four arguments<sup>2</sup> in support of their application for a writ:

- (1) Section 32-51(b) constitutes an unlawful delegation of legislative authority by the City to the University of Delaware.
- (2) They were denied due process of law.
- (3) Section 32-51(b) requires suspension or revocation of a fraternity's charter by the national fraternity before the nonconforming use is lost.
- (4) They had one year under the zoning ordinances to obtain another fraternity lessee before the non-conforming use was lost.

### **III. STANDARD OF REVIEW**

Review on certiorari is on the record and the reviewing court may not weigh the evidence or review the lower tribunal's factual findings.<sup>3</sup> “The reviewing court does not consider the case on the merits; rather it considers

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<sup>2</sup> Petitioners also contended in their briefs that § 32-51 is inconsistent with Delaware's Landlord-Tenant Code. They expressly abandoned this claim at oral argument and the Court will therefore not address it.

<sup>3</sup> *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, at \*2 (Dec. 16, 2004 Del. Supr.).

whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly.”<sup>4</sup>

Petitioners do not contend that the Board exceeded its jurisdiction or that it proceeded irregularly. Therefore, the only issue for this Court to determine is whether the Board committed errors of law. This Court will reverse a decision of the Board for an error of law “when the record affirmatively shows that the lower tribunal has ‘proceeded illegally or manifestly contrary to law.’”<sup>5</sup>

#### **IV. DISCUSSION**

*A. Section 32-51(b) does not unlawfully delegate Newark’s legislative function.*

Petitioners claim that § 32-51(b) of the Newark Zoning Code unlawfully delegates the City of Newark’s legislative function to the University of Delaware. Section 32-51(b) provides, in relevant part:

A fraternity or sorority, however, that is suspended by the University of Delaware so that it is no longer approved and/or sanctioned to operate as a fraternity or sorority for a period of more than one year shall vacate the building and the use as a fraternity or sorority shall be terminated immediately upon such University suspension.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Petitioners allege that section 32-51(b) “essentially gives the University power to decide who can and cannot operate a fraternity on property within the City of Newark,” and contend that this amounts to an unlawful delegation of the City’s legislative powers.

Petitioners rely heavily on *Marta v. Sullivan*<sup>6</sup> in support of their argument. The ordinance at issue in *Marta* provided that in a neighborhood where less than 50% of the properties were developed, 75% of the neighbors within a radius of 1/8 of a mile had to approve certain rezoning. The *Marta* court held that the ordinance was an unlawful legislative delegation because “[a] legislative body, such as the City Council of Newark, may not lawfully delegate its legislative powers to others. This non-delegation principle is especially compelling when a zoning ordinance is involved, because such legislation regulates the right to enjoyment of private property.”<sup>7</sup>

Unlike the ordinance in *Marta*, § 32-51(b) does not delegate any legislative function to the University of Delaware. The University did not make a zoning decision when it suspended PiKA; rather it decided only whether PiKA violated the University’s rules on the conduct of fraternities and the appropriate sanction for any violation. “Although the Legislature cannot delegate the power to make a law, it can delegate the power to

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<sup>6</sup> 248 A.2d 608 (Del. 1968).

<sup>7</sup> *Id.* at 609.

determine some facts upon which the law may depend.”<sup>8</sup> The University’s decision to suspend PiKA is manifestly a quasi-judicial act<sup>9</sup> and thus does not amount to an unconstitutional delegation by the City of its legislative powers. Although the University’s decision may have zoning consequences, those collateral effects do not transmute the University’s quasi-judicial decision into an exercise of the City’s legislative function.

Valid zoning regulations often depend on quasi-judicial determinations by third persons. As the City points out, for example, a municipal zoning regulation could validly precondition a liquor store’s non-conforming use on the store maintaining a valid license with the Alcoholic Beverage Control Commission. Suspension of that license by the ABCC with the ensuing loss of the non-conforming use cannot reasonably be construed as a delegation of the municipality’s legislative function to the ABCC.<sup>10</sup> Petitioners have not shown, and the Court cannot find, any meaningful distinction between such an instance and the case at bar.

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<sup>8</sup> *State v. Chudnofsky*, 176 A.2d 605, 607 (Del. Super. 1961) (holding that the delegation of power to the State Highway Department to change certain speed limits is not an improper delegation of legislative function).

<sup>9</sup> See *Marshall-Steele v. Nanticoke Memorial Hospital*, 1999 WL 458724, at \*6 (Del. Super. June 18, 1999) (“Where an administrative tribunal is under a duty to consider evidence and apply law to facts as found, the tribunal is performing a quasi judicial function.”).

<sup>10</sup> See *Appeal of Weinstein*, 48 A.2d 1, 2 (Pa. Super. 1946) (holding that the power conferred upon the Pennsylvania Liquor Control Board to suspend or revoke a liquor license is not an improper delegation of legislative function).



*B. Petitioners were not deprived due process of law.*

Petitioners contend that they were deprived of a property interest without due process of law. They have been afforded due process, however, on the only issue pending before the Board. The operative issue before the Board was whether the University had suspended PiKA's privilege to act as a fraternity. Petitioners do not claim, nor could they, that they were deprived of due process by the manner in which the Board resolved this issue. Indeed they had ample opportunity to present their argument on this issue during the lengthy proceedings before the Board.<sup>11</sup>

Petitioners contend that they should have been given an opportunity to argue before the Board that PiKA was not in violation of the University's regulations. Such an argument, fraught with the possibility of inconsistent decisions, could easily lead to the usurpation of powers traditionally reserved to the University. It would make no sense to judicially create a system in which the University could ban a fraternity for violation of the school's rules and then have the Board—which may be ill-equipped to make

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<sup>11</sup> See *Goldberg v. Rehoboth Beach*, 565 A.2d 936 (Del. 1989) (identifying the following elements of due process that may be required in a given situation: notice of government action, a hearing before a neutral arbiter, an opportunity to make an oral presentation and to present evidence, an opportunity to question witnesses, the right to be represented by counsel, and a decision based on the record).

certain judgments about the behavior of fraternities<sup>12</sup>—overrule the University’s decision in the guise of a zoning hearing. Indeed, both sides agree that the power to discipline fraternities properly rests with the University.<sup>13</sup> But, the logical extension of Petitioners’ argument would vest in the Board a veto power over the University in this regard.

In their briefs Petitioners repeatedly invite this Court to find that they were precluded from participating in the University’s proceedings. The difficulty with this argument is that Petitioners have failed to make any kind of record which would support such a conclusion. As Petitioners concede, there is nothing in the record showing what attempts, if any, they made to intercede in the University proceedings. Likewise there is no evidence in the record whether the University would have allowed them to participate had they made such an application. This Court cannot assume on the basis of a silent record that the University would have precluded Petitioners from having their say in its proceedings.

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<sup>12</sup> For example, it is within the purview of the University to suspend fraternities which fail to meet minimum academic standards. The members of the Board of Adjustment, who are not required to be educators, in all likelihood lack the tools necessary to determine when a fraternity’s academic performance is adequate. Yet under Petitioners’ argument, they would be allowed to argue to the Board of Adjustment that the University’s suspension of a fraternity for academic reasons was unjustified.

<sup>13</sup> See *Marshall v. Univ. of Delaware*, 1986 WL 11566 (Del. Super.) (“It is the University’s duty to establish regulations . . . to govern the conduct of fraternities . . . and to discipline those fraternities that fail to comply with those regulations”).

*C. Section 32-51 does not require suspension by a national organization*

Petitioners claim that the language of § 32-51(b) implies that not only the University of Delaware, but also a national fraternal organization, must suspend the fraternity in order to invoke the provisions of the ordinance. They rely upon language in the ordinance that “a fraternity, however, that is suspended by the University of Delaware so that it is no longer approved *and/or* sanctioned to operate as a fraternity.”<sup>14</sup> They somehow deduce from the use of the phrase “and/or” that the ordinance contemplates that the national organization must also suspend the local chapter before the ordinance applies. The logic of this contention eludes the Court. Even if the phrase following the term “and/or” could somehow be construed to refer to suspension by the national fraternity, the ordinance would be triggered by suspension by the University *or* suspension by the national fraternity. Moreover, the remainder of the ordinance contradicts Petitioner’s construction. The ordinance concludes by stating that “the use as a fraternity . . . shall be terminated immediately *upon such University suspension*.”<sup>15</sup> The reference to “University suspension” and the absence of any reference to suspension by a national fraternity leaves no room for doubt that suspension by the University alone triggers this ordinance.

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<sup>14</sup> Section 32-51(b) (emphasis added).

<sup>15</sup> *Id.* (emphasis added).

*D. Pursuant to § 32-51(b), Petitioners may no longer use the property as a fraternity house*

Petitioners argue that they located another fraternity to occupy the premises within one year of receiving notice of the suspension of PiKA and therefore their non-conforming use has been preserved.<sup>16</sup> In most instances the Newark Code preserves a discontinued non-conforming use if that use is revived within a year.<sup>17</sup> But the ordinance in question provides a different rule for fraternities and sororities. Section 32-51(b) states that upon the University's suspension of a fraternity "the use as a fraternity . . . shall be terminated immediately." Accordingly, under the ordinance the non-conforming use of the premises expired immediately upon the University's suspension of PiKA. The subsequent lease of the property for use of the premises by another fraternity, does not, as a matter of law, operate to preserve the non-conforming use.<sup>18</sup>

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<sup>16</sup> The City argues that Petitioners' petition for this writ is moot because they have found another fraternity to occupy the premises. The Board has already ruled that the premises cannot be used as a fraternity house by Kappa Delta Rho and at oral argument the City conceded that it will continue to enforce this ruling. Consequently there is still a case or controversy, and the alleged occupancy of the premises by Kappa Delta Rho therefore does not render the instant petitions moot.

<sup>17</sup> The first paragraph of § 32-51(b) provides that whenever "a nonconforming use has been discontinued for a period of one year, such use shall not thereafter be reestablished." The second paragraph of that subsection applies to fraternities and sororities and contains the special provision discussed in the text.

<sup>18</sup> There is a factual dispute as to whether Kappa Delta Rho occupied the premises within one year. The dispute was not resolved by the Board because of its interpretation of the ordinance. For the same reason this Court need not address the issue.

## V. CONCLUSION

For the reasons stated above, the Board did not commit any error of law and therefore the petitions for writ of certiorari are **DENIED**.

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cc: Prothonotary